



REPUBLIC OF KENYA

High Court at Garissa

Civil Appeal 13 of 2011

SALMA JIRE MOHAMED.....APPLICANT

VERSUS

RASHID ARALE BARE.....RESPONDENT

RULING

1. By an amended Notice of Motion dated 2nd July 2012, the applicant is seeking stay of execution pending hearing and determination of appeal. The application is brought under Order 40, 42 Rules 2, 4 & 5, Order 51 Rule 1 of the Civil Procedure Rules, under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicant is seeking the following orders:

- i. That this application be certified urgent and be heard ex parte in the first instance.
- ii. That the honourable court be pleased to order a stay of execution of the Judgement and Decree of the Kadhi's court given on 29th November 2011 until this appeal is fully heard and determined.
- iii. That this honourable court does issue such other orders as it may deem convenient in the circumstances.
- iv. That the costs of this application and the appeal be paid by the respondent.

2. The application is supported by grounds found on the face of the application and in the supporting affidavit sworn by the applicant on 2nd July 2012. The applicant intends to appeal against the judgement of the Kadhi. The issue for determination before the Kadhi was the estate of the applicant's deceased husband. In the grounds supporting the application, the applicant deposes that the respondent is illegally disposing of the estate of her deceased husband by selling the property comprising the estate and allocating to himself and other relatives. The applicant deposes further that the respondent in collaboration with other relatives are planning to take away the applicant's children and chase the applicant away from homestead of her deceased husband where she resides; that no maintenance has been paid for the upkeep of the minor children under the applicant's care; that she has brought the appeal without unreasonable delay and that the appeal has high chances of success. The application is not opposed. The respondent has not filed grounds of opposition, replying affidavit nor did he and/or his counsel submit in opposition.

3. Under Order 42 (6) (2) an applicant for stay of execution must satisfy the court on the following:
- (a) That substantial loss may result to him/her unless the order for stay is made.
 - (b) That the application has been made without unreasonable delay.
 - (c) That such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her has been given by the applicant.
4. The intended appeal challenges the judgement of the Kadhi delivered on 29th November 2011 and the subsequent decree drawn on 26th January 2012. The issues raised relate to a will relied on by the Kadhi in determining the case which the applicant claims is fictitious; alleged disregard of the law and religion in distributing the property of the deceased and rightful heirs. In the supporting affidavit, the applicant deposes that the respondent is wasting the estate by selling it and allocating parts of it to himself and other relatives. This action has aggrieved the applicant who claims rightful ownership together with her children. After due consideration of the matter, it is my finding that substantial loss may result if stay is not issued to preserve status quo pending hearing and determination of the appeal.
5. The applicant had brought an earlier application for an injunctive order against four respondents including the current respondent in this amended Notice of Motion. The application was filed on 21st December 2011. The court vacation had started and the court directed the matter to be served and inter partes hearing was fixed for 24th January 2012. The matter took some time as the parties sought amicable solution of the issues but when this failed, the matter was set down for hearing. By this time both parties had instructed advocates to represent them. Counsel for the applicant sought leave to amend the application and this was granted. Leave was also granted to the counsel for the respondent to file grounds of opposition and replying affidavit. However no documents were filed by the respondent. The court also granted temporary stay pending hearing inter partes and directed the applicant to serve the application. My considered view is that the application was filed without unreasonable delay.
6. With regard to security for costs, it is noted that the case is about inheritance and the estate of the applicant's deceased husband is the subject matter. The estate is not under the care of the applicant. In my considered view, the estate of the deceased is adequate security since the applicant is not in a position to dispose of the same and no prejudice will be occasioned to the respondent. The upshot of this is that the applicant has satisfied the requirements of Order 42 (6) (2). The application amended on 2nd July 2012 is hereby allowed in the following terms:
- (a) A stay of execution of the Judgement and Decree of the Kadhi dated 29th November 2011 and 26th January 2012 respectively is hereby granted pending hearing and determination of the appeal.
 - (b) The respondent is restrained from selling, allocating or in any other way disposing of the estate of the deceased or any part thereof pending hearing and determination of the intended appeal.
 - (c) The applicant does expeditiously file the appeal and serve the appeal documents to the respondent within 14 days from today to pave the way for the hearing of the appeal.
 - (d) The respondent does render account of any proceeds from the sale of the estate of the deceased or part thereof and also discloses any dealings in the estate of the deceased during the hearing of the appeal to inform the decision of this court.
 - (e) Costs of this application to be paid by the respondent.

Stella N. Mutuku, Judge

Dated, signed and delivered this 21th day of November 2012.